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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. RAFAEL RIVERA VILLARAUL, Defendant and Appellant.	F061017 (Super. Ct. No. F08901380) **OPINION**

APPEAL from a judgment of the Superior Court of Fresno County. Wayne R. Ellison, Judge.

Scott Concklin, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Charles A. French and Brook Bennigson, Deputy Attorneys General, for Plaintiff and Respondent.

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A jury convicted appellant Rafael Rivera Villaraul of first degree murder. The jury also found true that appellant used a deadly weapon, a knife, in the commission of

the offense. The trial court sentenced appellant to 25 years to life for the murder, plus a consecutive one-year term for the knife use. On appeal, appellant contends there was insufficient evidence of premeditation and deliberation to support his conviction of first degree murder. He also claims the court erred in giving CALCRIM Nos. 852 (uncharged domestic violence) and 370 (motive). Finally, he contends the court arbitrarily denied him the right to plead no contest to the lesser offense of second degree murder. We find none of his contentions meritorious and affirm the judgment.

FACTS

A. Overview

In February 2008, appellant's wife, Anna Rivera, died in her living room from a large knife wound to her neck. The wound was so deep a knife mark was visible on the front of her spine. The pathologist who conducted the autopsy opined that multiple cuts would have been required to produce a wound of such depth. Appellant testified in his defense that Anna attacked him with a knife and he grabbed and pulled her hand, causing her to fall over, presumably onto the knife. Appellant denied ever having the knife in his hands. However, in his police statement, which the prosecution presented as rebuttal evidence, appellant stated he picked up the knife and cut Anna's neck once while she was lying on the floor.

B. The Prosecution

1. Appellant's Prior Relationship with Anna

In February 2008, appellant lived with Anna and his two daughters, 16-year-old Geraldine and 10-year-old Alondra, in a duplex in Mendota.[1] A few years earlier, appellant seriously injured his foot at work and needed crutches to walk.

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[1] We frequently refer to family members by their first names, not out of disrespect but to ease the reader's task.

Geraldine testified that in February 2008, she and appellant were not on speaking terms. She explained that a couple months earlier, appellant had asked her to interpret legal papers concerning his foot injury. He became angry and tried to choke her because she did not understand the papers.

With respect to appellant's relationship with Anna, Geraldine testified that her parents frequently argued. She had also seen appellant be physically violent towards Anna. However, she had never seen Anna hit appellant. Anna was "little" and "weak" and would try to cover herself when appellant hit her.

In 2004, the police were called and appellant was required to stay away from Anna for a period of time. Even after appellant injured his foot, Geraldine saw him hit Anna at least three or four times.

Geraldine had heard Anna suggest she wanted to leave appellant. In response, appellant would laugh and say he would leave Anna and take the girls with him.

Like her sister, Alondra testified that appellant and Anna would frequently argue. Appellant would yell and tell Anna she was worthless. Alondra also saw appellant hit Anna. Alondra never saw Anna hit appellant. Although there had been a period of time when Anna had been very heavy, she had since lost a lot of weight and was "really skinny and fragile." Appellant, on the other hand, was "very chunky and strong." He was also a couple of inches taller than Anna.

Alondra further testified that appellant would treat Anna differently when other people were present. He would be nice to her and try not to yell or hurt her. Sometimes when Alondra was concerned appellant might hit Anna, she would call her aunt and uncle to come over to the house.

The aunt and uncle Alondra would call were Anna's sister, Isabelle Rosales, and Isabelle's husband, Gilberto Sanchez.

Isabelle testified that she visited Anna daily, and that appellant and Anna argued constantly throughout their marriage. Alondra would call Isabelle when they were

arguing, and Isabelle would go over to their house. According to Isabelle, Anna was always crying and appellant was always laughing and making fun of her.

At one point, Anna was very heavy and weighed over 300 pounds. Appellant was always commenting on Anna's weight, calling her a "cow" or a "horse." Anna decided to reduce her weight so appellant would not humiliate her anymore. Isabelle estimated that Anna lost around 200 pounds and became very thin.

At one point, Isabelle heard appellant tell Anna "if she wasn't going to be for him she wasn't going to be for anyone else. He would prefer to kill her." Isabelle could not recall precisely when appellant said this but it was during one of his quarrels with Anna.

On one occasion, Isabelle saw Anna with bruises and took her to Isabelle's physician for treatment. After that, the physician made a domestic violence report to the police and an investigation of appellant ensued.

A criminal complaint was subsequently filed, charging appellant with one count of violating Penal Code section 273.5, subdivision (a) (spousal abuse). On October 19, 2004, appellant pled guilty to a misdemeanor violation of the statute.

Gilberto's testimony was similar to that of his wife Isabelle. Gilberto was aware that appellant and Anna would argue because Geraldine and, more frequently, Alondra would call and ask him and his wife to come over to their house when appellant and Anna were fighting.

According to Gilberto, appellant and Anna would argue about "everything" and appellant was the person who typically started the fights. Appellant would use bad words and insult Anna, saying things like "you are a mule." Gilberto would try to help them resolve their differences. His presence during arguments seemed to help calm them down.

Gilberto had heard Anna bring up the idea that she might leave appellant in front of appellant. Appellant did not respond in Anna's presence. But once he told Gilberto privately that "if she wasn't going to be for him she wouldn't be for anyone else."

When Gilberto spoke to appellant about the incident underlying appellant's 2004 conviction of misdemeanor spousal abuse, appellant claimed that Anna "hit her own self." Although Gilberto heard appellant out, he did not believe him.

Maria Arevalo, one of Anna's sisters, testified that she lived in Los Angeles but would visit Anna and her family in Mendota approximately three times a year. When Maria visited, appellant would treat Anna like "trash." He was verbally abusive. He would call Anna a "cow" and say "she was not good as a woman for him."

During a Thanksgiving or Christmas visit approximately two years before the killing, Maria saw appellant and Anna fighting and told them they should get separated. Appellant responded by saying, "She goes dead. I kill her first." Even though appellant laughed when he said it, Maria did not think he was joking.

2. Night Before Killing (February 25, 2008)

Geraldine testified that Anna and appellant started arguing around 9:00 p.m. According to Geraldine, Isabelle and Gilberto came over to the house after Anna called them. However, Gilberto recalled that they went over simply to visit and no one called them beforehand.

Geraldine heard Anna crying and saying she loved appellant, but she could not take it anymore and she was tired of appellant treating her badly and not appreciating her. Anna said she was going to leave and take the girls with her. Appellant laughed and said she was not leaving.

When Gilberto and Isabelle arrived at the house, it appeared to Gilberto that appellant and Anna had been arguing. Anna was telling appellant to straighten out or she was not going to put up with him anymore. She said that if he did not change, she was going to leave him. Appellant just nodded his head up and down and said, "[u]m-hmm."

Alondra testified that she was "pretty sure" appellant and Anna did not fight that night. However, she also acknowledged telling a detective that after her aunt and uncle

came over, she went outside because she did not want to be inside while her parents were fighting.

3. Day of Killing (February 26, 2008)

Alondra and Geraldine varied somewhat in their accounts of what happened the morning of the killing. But their testimony essentially established that by 8:00 a.m., they had both left home and gone to their respective schools. On her way to school, Geraldine saw Anna returning to the house from walking Alondra to school.

The girls' bedroom was empty that morning because they had cleaned it out in anticipation of the arrival of two new beds. The furniture company had given assurances that the beds would be delivered by 10:00 o'clock that morning.

Bertha Rivera, appellant's sister-in-law, testified that appellant called that morning and asked her to pick him up at his house. Bertha lived on a ranch in Firebaugh and drove a white 1993 Ford Explorer. She estimated that it took 15 minutes to drive to appellant's house. She had also picked him up on past occasions when he fought with his wife.

When Bertha arrived, she rang the doorbell and heard loud music playing inside the house. She then returned to her car to wait for appellant. When appellant came out, he was walking with his crutches and carrying a plastic bag full of papers. On the ride to Bertha's house, appellant told her that he and Anna "had very big problems. It was bad." Bertha did not ask appellant what happened. After they arrived at Bertha's house, appellant stayed approximately five hours. He then left with her husband's co-worker, Armando Baron.

Acucena Lua, a neighbor of appellant, testified that she saw appellant leave his house that morning in a white Explorer or Suburban with a female driver. After appellant left, a furniture delivery truck came to appellant's house. It stayed for five or 10 minutes and then left. No furniture was unloaded.

Around 10:00 a.m., Alondra used her personal cell phone to try to call Anna, but her mother did not answer. Because Anna usually answered when she called, Alondra got scared and called Isabelle. Isabelle also tried calling Anna a number of times but no one answered.

Anna's body was discovered that afternoon, after Geraldine got out of school. Alondra got out of school earlier, but the door to the house was locked and she went to her aunt's house. While Geraldine was still at school, she started receiving calls from her aunt, starting around 2:50 p.m., asking if Anna was home because she kept calling and no one was answering.

Geraldine waited until school got out and then walked home. When she arrived, her sister, aunt, and uncle were waiting outside the house. Geraldine used her key to open the door. When she went inside, unusually loud music was playing. There was a lot of broken glass and Anna's ceramic dog figurines were broken and spread out over the floor.

Geraldine went into the living room and saw Anna lying on the floor. There was a pillow and sweater covering her face. When her aunt moved the pillow, Geraldine saw her mother's neck was sliced. Geraldine also saw a knife near Anna's body. She described it as "a big knife that my mom used to cut meat" and "the sharpest knife." The knife was usually kept in a drawer in the kitchen. Gilberto moved the knife for safety reasons, but he could not recall where he placed it.

Deputies and crime scene technicians from the Fresno County Sheriff's Department responded to the crime scene shortly after the discovery of Anna's body. A pillow was observed to be partially covering her face and there was a towel on her right arm. The knife involved in the killing was found on the top of a shelving unit just a few feet from Anna's body.

There was blood on the carpet underneath Anna's head. There was also blood on the shirt Anna was wearing. The blood on the shirt was primarily around the neck area

and did not run down the front of the shirt. Very small amounts of blood were found in other locations in the house, including drops of blood on the wall of the hallway between the front door and kitchen. There were also a few drops of blood on the armrest of a chair that was located between the dining table and Anna's body.

A vacuum cleaner was out in the kitchen area but was not plugged in. The living room television was turned on. In the front entryway, there was a plaster pedestal, which appeared to have fallen over and broken. A number of pieces from the pedestal were found stretching down the hallway, and a few pieces were found next to Anna's right leg. Broken ceramic dogs were observed near Anna's knees and scattered around the room.

Armando Baron testified that he picked appellant up around 3:00 or 3:30 p.m., at the request of appellant's brother, Ruben Rivera. Ruben told Baron that appellant was bored of being at Ruben's house and wanted to get some fresh air. For the next several hours, appellant rode around with Baron who needed to run errands. Baron then brought appellant back to the house with the understanding that Ruben would be coming to pick up appellant. Baron left appellant waiting outside by a tractor.

Around 9:41 p.m., sheriff's deputies went to Baron's residence to look for appellant. When they asked Baron where appellant was, he pointed to the tractor but then saw that appellant was no longer there. Deputies found tracks that led into the orchard behind Baron's residence. They were "circular tracks … caused by crutches." The deputies followed the tracks, assisted by a tracking dog and helicopter flying overhead. The helicopter had infrared technology which enabled deputies to spot someone on crutches walking through the field. From the time they arrived, it took deputies about 40 minutes to locate appellant.

4. The Pathologist's Testimony

Michael Chambliss, a forensic pathologist with the Fresno County Coroner's Office, autopsied Anna's body on February 27, 2008. He observed that she had multiple neck injuries, including "a very gaping large incised or cut wound to the neck which was

at least 11 and a half inches long" and extended "from ear to ear." This neck injury was the obvious cause of death.

Looking into this neck wound, Dr. Chambliss "could see injuries to the carotid arteries on each side which were each totally cut across." The internal and external jugular veins on both sides of the neck were "also completely cut across." The upper portion of the larynx (i.e., voice box) was also severed. Dr. Chambliss could see "a linear mark on the spine itself" and, thus, the depth of the wound "not only involved in the skin, soft tissues, muscles, down through the blood vessels of the neck down to the airway of the neck, but all the way down to the front of the spine."

Dr. Chambliss opined that multiple cuts produced the deep injuries to Anna's neck, and that these injuries "could not have been caused by simply one very hard pull across the neck." Dr. Chambliss also observed "three superficial cuts beneath the jaw" running parallel to the large neck injury. These cuts could have been caused "by separate placement of the knife in that location or by [the] individual struggling with the perpetrator with the knife in that position."

In addition, the pathologist found evidence of blunt force injuries to the back of Anna's head, which could have been caused by "an object or the head itself striking a blunt surface." Evidence of bleeding indicated she was still alive at the time she sustained the head injuries.

Anna's body also exhibited bruising along the right side of the upper lip and a bruise beneath the right chin. She had bruises and abrasions on both shoulders, abrasions just below the right knee, and a bruise on her left knee. Dr. Chambliss opined that these injuries were inflicted contemporaneously or within the same time frame at the injuries to her neck.

Dr. Chambliss opined that Anna would have died within four minutes of receiving the deep neck wound. Based on the lack of blood on her pants and the concentration of

blood on the upper portion of her shirt, above the breast line, he opined that Anna was lying down or on her knees when she received the neck wound.

III. The Defense

Appellant disputed his daughters' portrayal of him as verbally and physically abusive towards Anna. He testified he never made fun of his wife for being fat and that he could not recall ever using unkind or insulting words towards her. He also testified he never hit Anna at any time in their relationship.

With respect to his 2004 misdemeanor spousal abuse conviction, appellant essentially claimed that he pled guilty to protect Anna because she wanted to admit her injuries were self-inflicted to get the charges against him dropped; but appellant's defense counsel advised him that she would be charged if she did so. According to appellant, Anna faked her injuries after an incident in which he got up from the table during a family meal. Anna got angry and threw his plate into the trash saying, "we're going to eat here when I say so, not when you want to eat." Anna then insulted appellant and talked about his mother, so he left the house. The next day an officer came and arrested him for allegedly hitting his wife.

Appellant also disputed Geraldine's version of the incident in which he asked her to interpret some legal documents for him. According to appellant, he did not get angry but simply told Geraldine she was not translating correctly. She responded by throwing the papers in his face and saying she did not have a father anymore. After that, she stopped talking to him. Appellant denied that he hit Geraldine or tried to choke her during the incident. According to appellant, it was Anna who said he should hit Geraldine because of what she said to him. But appellant told Anna, "She is already grown up and she knows what she is doing. She doesn't need that."

Appellant's testimony likewise painted a less flattering portrait of Anna. He described a 2004 incident in which Anna attacked him with a knife. Appellant explained that he was working at the time and had gone home for lunch. When he told Anna the

tortillas were still cold, she threw them in his face and told him to heat them up himself. Appellant got up and Anna came up behind him. He felt something catch his shirt. It was a knife and it left a hole in his shirt. When he returned to work, he told his coworker, Francisco Pulido, about the incident. Pulido also testified, confirming that appellant returned to work with a two-inch hole in his shirt, and told him that Anna had tried to "scratch" him in his midsection with a knife but got his shirt instead.

Appellant testified that his relationship with Anna changed for the worse after he injured his foot at work. On October 30, 2004, a 3000-pound piston from a dump trailer fell on top of his foot. The injury was so severe that, at one point, there was talk of amputating the foot. Appellant was on numerous different medications. The pain in his foot would increase with cold weather. If he got up in the middle of the night to take a pill for the pain, Anna would complain that he was waking up her and the girls.

Appellant also described Anna isolating him from his other family members after he injured his foot, including by taking his crutches away from him so he could not walk to meet them. Appellant recalled an incident in December 2007, when his brother came over to his house with a police officer to check on his welfare. Appellant did not meet with his family that day because Anna told him not to go out if he did not want to fight with her.

Appellant denied that he and Anna had been arguing the night before she died or that there had been any discussion about them separating. According to appellant, Anna's sister and her husband came over with their youngest boy and stayed for about an hour. During that time, Alondra and the boy got into a fight. Anna responded by hitting Alondra. Appellant asked Anna why she hit Alondra if she did not know what the problem had been between the two children. Anna replied, "if you don't know, you shut up." Appellant did not say anything more to Anna after this. He went to his room and the guests left.

The next morning, appellant's relationship with Anna was fine. They were not arguing or fighting. After Anna left to walk Alondra to school and Geraldine left for school, appellant was just sitting on the couch. Anna was gone between 20 to 25 minutes. When she returned, she started cleaning the house.

Appellant was in the living room, sitting in the couch and watching TV, when Anna came in and started vacuuming the carpet. She also turned on the stereo. Appellant never touched the stereo. While Anna was vacuuming, she hit appellant's injured foot with the vacuum. Appellant thought she hit his foot intentionally and told her to watch out and asked her why she hit him. Anna responded by telling him to "fuck" his mother. As Anna was walking, she pulled the vacuum cord, causing the pillar to fall and break. She then took off to the kitchen. Appellant remained on the couch with his crutches under his feet.

Anna returned holding the knife and said, "I told you son of a whore that something was going to happen to you." Initially, appellant did not think anything was going to happen because when Anna threatened him with a knife in 2004, it had only grazed his shirt. But this time the knife grazed the side of his neck. Appellant reacted by grabbing Anna's hand, leaning back on the couch, and pulling with all his strength. Anna fell in front of him. After Anna fell, appellant got up and did not look to see if she was cut or where the knife fell. He left and called his brother Ruben. He then called Bertha from the kitchen phone to tell her to pick him up quickly.

Before Anna attacked him, appellant's foot had been resting on a towel and pillow. After she fell down, he grabbed his crutches and threw the towel and pillow on top of her because he thought she was going to attack him with the knife. When he threw these items on Anna he saw her moving her mouth, but he told himself she was just trying to scare him. Appellant testified that it was Anna's "custom" to fall to the floor after they got into a fight.

Bertha arrived approximately 10 minutes after appellant called her. When she arrived, appellant grabbed all his personal paperwork, which he kept in a bag next to the phone. Bertha drove appellant to her house, where he ate breakfast. She asked appellant if he and Anna had fought and he responded, "no, only arguments. You know how it is. Arguments again."

Appellant's brother Ruben arrived at lunchtime. Appellant did not talk to him about what happened. Appellant stayed at his brother's house until around 3:00 or 3:30 p.m. Appellant wanted to go out to the fields to "just pass some time." Ruben arranged for Armando Baron to pick appellant up.

Baron brought appellant back to his house around 7:00 or 7:30 p.m. Appellant waited outside and Baron brought him a blanket and some coffee. Appellant took the blanket and sat down next to the orchards.

Appellant went walking in the orchards when he saw two cars arrive and people shining flashlights. Appellant did not know who they were but thought they might be hunters. He went further inside the orchard "[f]or precaution only." When the people started shining their lights in appellant's direction, they never said they were police or that they were looking for someone. Eventually, a helicopter arrived and appellant saw two officers coming with a dog. They yelled at him to get down on the ground and he complied.

The first time appellant learned Anna was dead was after he was arrested and told by the police. Appellant denied telling the police he cut Anna, testifying: "They may have transferred the testimony, but I never said—I told him that we had struggled over the knife. The knife was close, but I never said that I cut her." Appellant was not sure if he cut Anna's throat in the struggle but maintained he was "100 percent sure" that "the knife was never in [his] hands." Although appellant saw Anna fall and wondered if she hit the back of her head, he did not, in fact, see her hit her head. He did not see any blood on Anna nor did he see the cut on her neck.

The defense called a number of character witnesses including two of appellant's siblings, Angelita Rivera and Ruben Rivera, who testified to Anna's purported isolation of appellant from his side of the family after he injured his foot. They described their frustrated attempts to visit and call appellant at this house. On one occasion in December 2007, when an attempt to visit appellant was frustrated by Anna, they felt compelled to call a sheriff's deputy to check on appellant's welfare.

The defense also called Felipe Gonzalez, the owner of Gonzalez Towing, where appellant worked before he injured his foot, and Rudolfo Perez, a coworker of appellant's at Gonzalez Towing. They testified to an incident in 2004, in which Anna, accompanied by her daughters, came to Gonzalez Towing looking for appellant. According to Gonzalez, "she entered calling [appellant] very bad words and mistreating him." When Perez tried to intervene, Anna called Perez a "mother fucker" and told him not to get involved in her problems or she would kill him.

IV. The Rebuttal

Detective Jaime Loredo testified that he and Detective Sergio Toscano interviewed appellant at Fresno Sheriff's headquarters following his arrest. During the interview, appellant said he was watching television in the living room and Anna was vacuuming. After she bumped his injured foot, a heated argument ensued. She left the living room and came back with a large knife. Appellant tried to hit it out of her hand. She dropped the knife. They were both on the floor struggling, when appellant grabbed the knife and cut Anna's neck one time.

Appellant confirmed that when he cut Anna's neck, "it was very forceful." He also acknowledged seeing the wound on her neck afterwards. Appellant told the detectives that after he cut Anna's neck, she started shaking. He also saw her opening her mouth. It appeared to him she was about to die. He reacted by placing a towel and pillow over her face.

With respect to the argument appellant and Anna were having that morning, appellant told the detectives that, for several years, he and Anna had been fighting an insurance company about his foot injury. During the argument, Anna made a statement referring to that insurance claim. She told appellant that she had betrayed him with the insurance company and had already received the money. She also said she was going to leave him. After Anna made these statements, appellant "got very angry." With respect to the broken figurines found in the house, appellant said he broke them by grabbing and throwing them.

Appellant said that after the incident, he went and sat outside his house. While seated outside, appellant saw a friend passing by. He waved the friend over and asked him to take him away. Appellant was unwilling to give the detectives the name of the person who drove him away.

Appellant also told the detectives that no knives had ever been involved in previous fights with Anna.

Alondra and Geraldine also testified as rebuttal witnesses, disputing their father's negative characterization of Anna and his version of what happened the night before she was killed. They never saw their mother engage in any of the behaviors appellant described, such as taking away his crutches, throwing his food in the trash, using bad language towards him, or inflicting injuries on herself or pretending to be hurt.

DISCUSSION

I. Sufficiency of the Evidence of Premeditation and Deliberation

Appellant contends that the evidence was insufficient to support the jury's finding of premeditation and deliberation and, therefore, his "conviction must be reduced to second degree murder." We disagree and conclude substantial evidence supports the jury's finding.

We must affirm the judgment if substantial evidence supports the finding on premeditation and deliberation. (*People v. Perez* (1992) 2 Cal.4th 1117, 1124 (*Perez*).)

Substantial evidence is evidence of legal significance, reasonable in nature, credible, and of solid value. (*People v. Samuel* (1981) 29 Cal.3d 489, 505.) We review the entire record in the light most favorable to the judgment below and presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. The test is whether substantial evidence supports the conclusion of the trier of fact, not whether the evidence proves guilt beyond a reasonable doubt. (*People v. Crittenden* (1994) 9 Cal.4th 83, 139.) Consequently, a defendant attacking the sufficiency of the evidence "bears an enormous burden." (*People v. Sanchez* (2003) 113 Cal.App.4th 325, 330.)

Review of evidence supporting a finding of premeditation and deliberation involves consideration of the evidence presented and all logical inferences from that evidence in light of the legal definition of premeditation and deliberation. (*Perez, supra,* 2 Cal.4th at p. 1124; *People v. Anderson* (1968) 70 Cal.2d 15 (*Anderson*).) Deliberation refers to the actor carefully weighing considerations in forming a course of action; premeditation means the actor thought over those considerations in advance. (*People v. Halvorsen* (2007) 42 Cal.4th 379, 419.) "'The process of premeditation and deliberation does not require any extended period of time. "The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly...." [Citations.]'" (*People v. Koontz* (2002) 27 Cal.4th 1041, 1080.)

As stated in *Anderson,* premeditation and deliberation may be shown by circumstantial evidence. (*Anderson, supra,* 70 Cal.2d at p. 25.) *Anderson* identified three types of evidence bearing on premeditation and deliberation: "(1) facts about how and what defendant did *prior* to the actual killing which show that the defendant was engaged in activity directed toward, and explicable as intended to result in, the killing—what may be characterized as 'planning' activity; (2) facts about the defendant's *prior* relationship and/or conduct with the victim from which the jury could reasonably

infer a 'motive' to kill the victim, which inference of motive, together with facts of type (1) or (3), would in turn support an inference that the killing was the result of 'a pre-existing reflection' and 'careful thought and weighing of considerations' rather than 'mere unconsidered or rash impulse hastily executed' [citation]; (3) facts about the nature of the killing from which the jury could infer that the *manner* of killing was so particular and exacting that the defendant must have intentionally killed according to a 'preconceived design' to take his victim's life in a particular way for a 'reason' which the jury can reasonably infer from facts of type (1) or (2)." (*Anderson, supra,* 70 Cal.2d at pp. 26-27, original italics.) The *Anderson* factors provide a framework in analyzing the sufficiency of the evidence of premeditation and deliberation, but a finding all the factors are present is not required to sustain a finding of premeditation and deliberation. (See *Perez, supra,* 2 Cal.4th at p. 1125.)

Following the *Anderson* guidelines, we conclude the jury reasonably could have inferred from the evidence that the killing was premeditated and deliberate. With respect to appellant's prior relationship and conduct with the victim, the evidence showed appellant had engaged in past acts of physical and verbal abuse against Anna, and had a prior conviction for misdemeanor spousal abuse. He also made statements to the effect he would rather kill Anna than for her to live separately from him. And there was evidence Anna threatened to leave appellant the night before the killing. Even appellant reported that Anna said she was going to leave him during the argument he claimed preceded her purported attack with the knife. The jury reasonably could have inferred a motive to kill from these facts concerning appellant's prior relationship with Anna.

With respect to the nature of the killing, there was evidence that appellant cut Anna's neck with the knife while she was lying, disarmed, on the floor. There was also evidence that the deep neck injury appellant inflicted on Anna could not have been caused by a single cut. Rather, in order to cut through muscle and vital structures in the neck and penetrate to the depth of Anna's spine, appellant was required to apply the knife

multiple times to her neck. Thus, the method appellant used to kill Anna was sufficiently "'"particular and exacting"' to warrant an inference that defendant was acting according to a preconceived design. [Citation.]" (*People v. Thomas* (1992) 2 Cal.4th 489, 518.) Appellant's arguments to the contrary are unpersuasive.

Finally, the fact that elaborate planning activity is not in evidence does not foreclose finding sufficient evidence of premeditation. (*People v. Millwee* (1998) 18 Cal.4th 96, 134.) As reflected in CALCRIM No. 521, premeditation and deliberation are not measured by duration of time. (*People v. Bolin* (1998) 18 Cal.4th 297, 332.) Appellant may have arrived at his decision to act in a short period of time, but his act does not bear the characteristics of a rash impulse. The evidence supported a reasonable inference that, while Anna was lying helpless on the floor, appellant started cutting into her neck and did not stop until the knife hit the top of her spine. When it appeared she was about to die, appellant threw a towel and pillow on her face and fled. On the record before us, we have no difficulty concluding there was sufficient evidence of premeditation and deliberation to support appellant's conviction of first degree murder.

II. CALCRIM No. 852

The trial court gave the following version of CALCRIM No. 852:

> "The People presented evidence that the defendant committed domestic violence that was not charged in this case, specifically, that he abused his wife, Anna Rivera, in 2004, resulting in a conviction for a violation of Penal Code section 273.5 and that his wife, Anna Rivera, on one or more occasions after he suffered a work-related injury to his foot. Domestic violence means abuse committed against an adult who is a spouse or person with whom the defendant has had a child.
>
> "Abuse means intentionally or recklessly causing or attempting to cause bodily injury, or placing another person in reasonable fear of imminent serious bodily injury to herself or to someone else.
>
> "You may consider this evidence only if the People have proved by a preponderance of the evidence that the defendant in fact committed the uncharged domestic violence. Proof by a preponderance of the evidence is

> a different burden of proof from beyond a reasonable doubt. A fact is proved by a preponderance of the evidence if you conclude that it is more likely than not that the fact is true. If the People have not met this burden of proof, you must disregard this evidence entirely.
>
> "If you decide that the defendant committed the uncharged domestic violence, you may, but are not required to, conclude from that evidence that the defendant was disposed or inclined to commit domestic violence and, based on that decision, also conclude that the defendant was likely to commit and did commit the crime charged or a lesser crime. If you conclude that the defendant committed the uncharged domestic violence, that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove that the defendant is guilty of either the charged or a lesser crime. The People must still prove the charge beyond a reasonable doubt.
>
> "Do not consider this evidence for any other purpose except for the limited purpose of determining the defendant's credibility."

Appellant contends the trial court erred when it instructed the jury, pursuant to CALCRIM No. 852, that it "may, but [was] not required to, conclude from [the uncharged domestic violence] evidence that … the defendant was likely to commit and did commit the crime charged or a lesser crime." Appellant contends the instruction violated his right to due process because it contained an irrational permissive inference. "Because misdemeanor domestic abuse is more often the result of passion, short temper, and/or uncontrolled movements of anger rather than malice and deliberation," appellant asserts, "it was irrational to permit the jury to infer from prior incidents of misdemeanor domestic abuse that appellant committed first degree murder, i.e., that he intentionally killed his wife and that he did so after making a cold and calculated decision to kill her."

As an initial matter, we reject respondent's contention appellant invited any error. "The doctrine of invited error bars a defendant from challenging an instruction given by the trial court when the defendant has made a 'conscious and deliberate tactical choice' to 'request' the instruction. [Citations.]" (*People v. Lucero* (2000) 23 Cal.4th 692, 723-724.) Here the record does not establish appellant requested CALCRIM No. 852 based on a conscious and deliberate tactical choice. "The clerk's transcript indicates that the

defense joined [the prosecution] in *requesting* the instruction. The record does not make clear whether this decision was a 'conscious and deliberate' tactical choice, thus forfeiting, under the doctrine of 'invited error,' an appellate claim that the instruction was erroneous or misleading. [Citation.]" (*People v. Boyer* (2006) 38 Cal.4th 412, 473, fn. 47.) Moreover, appellant's lack of objection to CALCRIM No. 852 does not preclude review of the issue on appeal. Since his substantial rights were affected if error occurred, we address the merits of his claim despite the fact he failed to raise it below. (§ 1259; *People v. Prieto* (2003) 30 Cal.4th 226, 247.)

Although appellant's contention is reviewable, it is not persuasive. The Legislative history of Evidence Code section 1109, under which evidence of appellant's prior acts of domestic violence was admitted, belies his characterization of individual "misdemeanor" acts of domestic violence as uncontrolled bursts of bad temper with no rational connection to more calculated acts of domestic violence, such as the premeditated killing of a spouse. As the court explained in *People v. Johnson* (2000) 77 Cal.App.4th 410, at page 419:

> "*[T]he legislative history of [Evidence Code section 1109] recognizes the special nature of domestic violence crime*, as follows: 'The propensity inference is particularly appropriate in the area of domestic violence because on-going violence and abuse is the norm in domestic violence cases. *Not only is there a great likelihood that any one battering episode is part of a larger scheme of dominance and control, that scheme usually escalates in frequency and severity*. Without the propensity inference, the escalating nature of domestic violence is likewise masked. If we fail to address the very essence of domestic violence, we will continue to see cases where perpetrators of this violence will beat their intimate partners, even kill them, and go on to beat or kill the next intimate partner." (Italics added.)

Viewing evidence of prior domestic violence in this light, we conclude the jury here logically could have inferred from evidence that appellant committed acts of domestic violence against Anna in the past that he had a propensity to commit such acts against her and was likely to and did commit the first degree murder charged in this case,

a crime which, as appellant recognizes, is the ultimate form of domestic violence. Moreover, courts have upheld the admission of prior incidents of domestic violence under Evidence Code section 1109 to show a propensity to commit first degree murder and have found no due process violation in doing so. (See *People v. Escobar* (2000) 82 Cal.App.4th 1085, 1094-1097; see also *People v. Johnson*, *supra*, 77 Cal.App.4th 410.) In short, the prior domestic violence evidence against appellant was admissible to the first degree murder charge. Thus, the trial court properly instructed the jury with CALCRIM No. 852.

III. CALCRIM No. 370

The trial court gave the following version of CALCRIM No. 370:

> "The People are not required to prove that the defendant had a motive to commit the crime charged. In reaching your verdict you may, however, consider whether the defendant had a motive. [¶] Having a motive may be a factor tending to show that the defendant is guilty. Not having a motive may be a factor tending to show the defendant is not guilty."

Appellant contends CALCRIM No. 370 was erroneous because it removed motive from the requirement of proof beyond a reasonable doubt. Appellant essentially argues that in murder prosecutions where the People rely on motive as circumstantial evidence the defendant acted with premeditation and deliberation, the People are required to prove motive as a "fact essential to that conclusion." (CALCRIM No. 224.)[2] According to appellant, CALCRIM No. 370 "singles out motive as a fact that is specifically exempted from the general requirement of proof beyond a reasonable doubt," and, therefore, "the jury would view CALCRIM No. 370 as controlling (when motive is involved) over

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[2] CALCRIM No. 224 informed the jury, in relevant part: "Before you may rely on circumstantial evidence to conclude that a fact necessary to find the defendant guilty has been proved, you must be convinced that the People have proved each fact essential to that conclusion beyond a reasonable doubt."

general instructions requiring proof beyond a reasonable doubt, such as CALCRIM No. 220 and CALCRIM No. 224." We disagree.

"In considering a claim of instructional error we must first ascertain what the relevant law provides, and then determine what meaning the instruction given conveys. The test is whether there is a reasonable likelihood that the jury understood the instruction in a manner that violated the defendant's rights. In making this determination we consider the specific language under challenge and, if necessary, the instructions as a whole. [Citation.]" (*People v. Andrade* (2000) 85 Cal.App.4th 579, 585.)

In general, the motive or "reason" a person chooses to commit a crime is not an element of an offense. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 504.) Thus, CALCRIM No. 370 is correct in stating that the prosecution is "not *required* to prove that the defendant had a motive to commit the crime charged." (Italics added.) Although proof of motive is not required, motive evidence may nonetheless be *relevant* to the issue of guilt. (See e.g., *People v. Walker* (2006) 139 Cal.App.4th 782, 796 ["'In a prosecution for murder, proof of motive is material to a finding of premeditation and deliberation [citation]'"].) Thus, CALCRIM No. 370 correctly states that "motive may be a factor tending to show that the defendant is guilty" and the lack of "motive may be a factor tending to show the defendant is not guilty." "The fact that evidence tends to prove guilt merely establishes its *relevance* on the issue." (*People v. Anderson* (2007) 152 Cal.App.4th 919, 943, italics added.) CALCRIM No. 370 correctly tells the jury that it may consider motive evidence as relevant to the issue of guilt.

We do not think there is a reasonable likelihood the jury would have understood the language of CALCRIM No. 370 to mean that motive is, in appellant's words, "a special form of circumstantial evidence that is exempt from the rule requiring proof beyond a reasonable doubt." As we explained in *People v. Ibarra* (2007) 156 Cal.App.4th 1174 at page 1193: "CALCRIM No. 370 *instructs on motive ... not on burden of proof.* The charge to the jury elsewhere instructed that the defendant is

presumed innocent, that the defendant does not have to prove he or she is not guilty, and that the prosecution has the burden of proof beyond a reasonable doubt. [Citations.]" (Italics added.)

IV. Plea Bargain

Prior to jury selection, the parties and trial court engaged in extensive discussion regarding a plea offer which contemplated appellant pleading no contest to second degree murder (with a mandatory sentence of 15 years to life) and dismissal of the knife use allegation in exchange for appellant's waiver of his appellate rights. During the discussion, appellant expressed reluctance but eventually stated he wanted to enter the plea agreement. Later, however, he changed his mind and stated that he wanted a jury trial, as reflected in the following exchange:

> "THE COURT: …Then, Mr. Villaraul, sir, how do you plead to a violation of Penal Code Section 187(a), that is the only count in this information, second-degree murder, guilty, not guilty, no contest?
>
> "THE DEFENDANT: No contest.
>
> "THE COURT: You understand as I told you earlier, sir, that's the same thing as a guilty plea?
>
> "THE DEFENDANT: Yeah. And that's why I wanted to put down not guilty. It's the same thing I've been telling the attorney.
>
> "THE COURT: But, you know, I'm going to come to that. This is the last step, sir. And I want to say, you know, *if you think you are not guilty, then the answer is to go to trial*. And I'll bring these jurors up here and we'll do this trial, if that's what you are telling me. But if you tell me you want to accept your no contest plea then I'll accept the plea, *but you can't do both*.
>
> "THE DEFENDANT: I want the jury trial.
>
> "THE COURT: Done. Okay. Counsel, we're bringing [the prospective jurors] up here. As soon as they get up we'll take roll and get going." (Italics added.)

Focusing on the remarks italicized above, appellant contends the trial court essentially advised him that "he could not plead no contest while continuing to think of himself as not guilty" and "if he thought himself not guilty, he had no choice but to go to trial, and that his plea of no contest could not be accepted." Appellant asserts that the court's "abrupt ultimatum" effectively "operated as an arbitrary rejection of the plea bargain that had already been negotiated and agreed upon." (See *People v. Smith* (1971) 22 Cal.App.3d 25, 30 ["[a]lthough it is within the discretion of the court to approve or reject the proffered offer, the court may not arbitrarily refuse to consider the offer"].)

Assuming without deciding appellant did not waive the issue by failing to raise it below, we conclude that the trial court's remarks, when viewed in context of the lengthy discussion preceding it, did not convey the meaning appellant suggests but simply told him he could accept the plea offer or have a jury trial but not both. This interpretation is consistent with the court's earlier remarks warning appellant that once he opted for a jury trial, the plea offer would be gone; i.e., he could not do both. Moreover, as appellant recognizes, the court properly advised him during the proceedings that he could enter a plea while maintaining his innocence. Thus, the court told him: "[T]here are circumstances in which *a defendant who is saying I didn't do this crime can nevertheless enter a plea*. What's called no contest, which I think is what your attorney has suggested. And the form you filled out is no contest, where *you don't have to admit that you murdered wife*." (Italics added.)

Although appellant suggests he would have entered the plea but for the complained-of comments by the trial court, the record indicates that appellant was wavering throughout the proceedings, with his primary concern being the amount of time he would have to serve if he entered the plea agreement. Appellant wanted the plea offer to cap his sentence at 15 years. The court took great pains to explain to him that the sentence would be 15 years *to life*, and no one was promising him that he would ever get out of prison. The record simply fails to establish that appellant changed his mind and

decided to go to trial because the court's comments suggested, in appellant's words, "[t]o obtain the benefits of the plea agreement, he had to abandon his personal belief that he was not guilty." The court never specifically said this but did explicitly advise appellant he could enter a no contest plea without admitting he murdered his wife. Thus, on the record before us, we find appellant's interpretation of the trial court's comments unpersuasive and reject his claim that the court arbitrarily denied him the right to plead no contest to second degree murder.

DISPOSITION

The judgment is affirmed.

_____
HILL, P. J.

WE CONCUR:

_____
CORNELL, J.

_____
KANE, J.